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No. 22

In the Supreme Court of the United States

OCTOBER TERM, 1945

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

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he Supreme Court of the United States

OCTOBER TERM, 1945

No. 139

MAX LEVINSON, PETITIONER

v.

PECTOR MOTOR SERVICE, A CORPORATION,
RESPONDENT

IT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

F OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

brief amicus curiae is submitted by the In-
e Commerce Commission at the suggestion
Court.

facts are fully developed in the petition for
f certiorari and briefs filed in support
and in opposition thereto.

matter before the Court involves the ques-
whether the petitioner, Max Levinson, an
ee of the respondent, is entitled to recover
e pay under section 7 of the Fair Labor

Standards Act of 1938 (52 Stat. 1860; 29 U. S. C., sections 201–219) or whether he, as an employee of a common carrier by motor vehicle subject to the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act, 49 U. S. C., section 304), is excepted from that section of the Labor Standards Act by section 13 (b) of the latter, which provides:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

The Motor Carrier Act (Part II of the Commerce Act), by its section 204, above referred to, provides that:

> (a) It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle as provided in the Part, and to this end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment;
>
> (2) To regulate contract carriers by motor vehicle as provided in this Part, and to that end the Commission may establish

> reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment;
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *

Following the enactment of the Motor Carrier Act, the Commission, in proceedings involving its authority with respect to employees of common and contract motor carriers under the above subparagraphs (1) and (2) of section 204 (a), concluded that its power was "limited to prescribing qualifications and maximum hours of service for those employees * * * whose activities affect the safety of operation." That is to say, while subparagraphs (1) and (2) do not in terms limit the "employees" of common and contract carriers covered, the Commission concluded from the Act's legislative history and other considerations that it was in fact intended to limit its power in the premises to those employees whose work affects such safety of operation. *Ex Parte No. MC-28*, 13 M. C. C. 481, 488.[1] And this construction of subparagraphs (1) and (2) was upheld by this Court in *United States* v. *American Trucking*

[1] Cf. *Ex Parte No. MC-2*, 3 M. C. C. 665, 667.

Associations, Inc., 310 U. S. 534, the Court saying (p. 553):

> Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others.

It is here further mentioned that while, in the above case, the Court's opinion states that the interpretation and meaning which the Commission and also the Wage and Hour Division of the Department of Labor had placed on subparagraphs (1) and (2) of section 204 (a) should be accorded great weight (p. 549), the opinion also makes plain (544) that, except for the rule of according weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function."[2]

Levinson, the petitioner herein, was employed by the respondent motor carrier as a checker of freight at its Chicago terminal. He was one of a gang of men engaged generally in the unloading and loading of freight and, in addition to his duties as checker, supervised and directed the work of the other men both in the unloading and

[2] Apparently this is not fully understood by petitioner. Petition for writ, p. 8.

in the loading of freight. Freight, it appears, is, for reasons of safety of operation, loaded into trucks according to size and weight; heavy weighted or "bottom freight" being distributed in the lower part of the truck and lighter weighted or "balloon freight" being placed at the top.

The trial court found that the major portion of Levinson's work did not affect safety of operation and, based on that finding, held that he was not exempted from section 7 of the Labor Standards Act by section 13 (b) (1) thereof. The Appellate Court, First District of Illinois, in reversing the judgment of the trial court held (petition, 22–23) that the quantity of "safety work" done was not a sound guide as to the applicability of the exemption; that the true determinant was "whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial;" and, in this connection, it found that there was no question that some part of Levinson's work was devoted to the direction and supervision of the loading; that there was no question either that the loaders in his gang were exempted; and, that, if they, in carrying out his directions were exempt because performing work affecting the safety of operation, it followed with all the more force that the duties of Levinson, who planned and directed the loading, affected that safety.

The Supreme Court of Illinois, although holding (R. 62–64), contrary to the view of the Appellate Court, "that the true determinant is not whether an employee performs any duties which substantially affect the safety of operation, but whether the duties affecting the safety are substantial," nevertheless, affirmed the judgment of the Appellate Court on the ground that the latter had found that Levinson was in the same position as the loaders in his gang; that the loaders were exempted and that Levinson therefore came within the exemption because he planned and directed the loading affecting the safety of operation. "The Appellate Court may," the Court said, "be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers."

DISCUSSION

For reasons presently to be given, it is believed that the Appellate Court was right in its holding that the quantity of an individual employee's work affecting safety of operation was not the "true determinant" and that the Illinois Supreme Court was wrong in its holding to the contrary. However, both courts agree that Levinson fell within the Commission's authority under section 204 (a) of the Motor Carrier Act and therefore was exempt from section 7 of the Labor Act, and both rely largely on the ground that he, as an

in effect foreman thereof, was in the same position as the loaders in his gang.

Certainly Levinson, as supervisor, or foreman, planning and directing the loading, was as much engaged in work affecting the safety of operation as were the men working under him. And clearly, "on the face of things" and as shown by the Appellate Court's findings, the manner in which freight is loaded into trucks directly affects such safety.

Both of the Illinois courts refer to the Commission's report in *Ex Parte No. MC–2,* 28 M. C. C. 125, and both consider, apparently, that the Commission, by certain statements in the report, indicated the view that, in order that an employee be subject to its authority under section 204 (a) of the Motor Carrier Act and thus excepted from section 7 of the Labor Act, he must be shown to devote a substantial part of his time to work affecting safety of operation. The report in question was issued in a proceeding instituted following this Court's decision in the *American Trucking Associations Case, supra,* and for the purpose (p. 126) of determining which employees of motor carriers, in addition to drivers, perform work affecting the safety of operation and therefore are subject to the Commission's power to prescribe qualifications and maximum hours of service. Early in its report (131), the Commission, in discussing its authority generally, referred to the

Hours of Service Act (relating to railroads) administered by it, which Act, in providing that it shall be unlawful for employees actually engaged in or connected with the movement of trains to be on duty for more than 16 consecutive hours, made such provision subject to the proviso that it shall be unlawful "for an operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches trains, to be on duty for more than 9 hours in any period of 24 hours." This proviso, it appears from the Commission's report, was urged in certain court cases to apply to conductors and switchmen who were shown to occasionally use the telephone to transmit orders to the engineers. However, the decisions in the cases held that the proviso was not intended to apply to employees making only such occasional use of the telephone to dispatch trains, but only to those employees whose chief duties were those of a telegraph or telephone operator or train dispatcher.[3] Based, as it says, on its study of these decisions and of this Court's decision in the *American Trucking Associations Case, supra,* the Commission concluded that it should not assert jurisdiction over employees who spend an unsubstantial part of their time in safety work, and continuing, it says:

[3] In reaching this conclusion the courts apparently relied on the particular language of the proviso and applied the rule *ejusdem generis.*

> We therefore conclude that under said section 204 (a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category.

Both of the Illinois courts apparently considered (R. 2) that this statement of the Commission was intended to apply to an individual employee, but there is nothing in the statement requiring any such reading and, since the Commission went on to apply the same to employees as a whole in the several classes dealt with, there is no reason to believe it was setting up a rule for application to each individual employee within each such class.

Following the general discussion of its authority, the Commission, in its report, specified 3 classes of employees, other than drivers, whose activities were shown by the evidence to affect safety of operation, namely, (1) mechanics, (2) loaders, and (3) drivers' helpers. In the body of the report leading up to the ultimate findings and conclusions, the Commission discusses the evidence introduced (132–137) and, with respect to each such class of employees, points out the rea-

sons why the duties involved do affect safety of operation and also in a general way the amount of time devoted to duties so affecting such safety. As to mechanics,[4] the Commission, after mentioning that it is upon them that the primary duty rests of keeping the trucks in good and safe working condition, including the duty of keeping the lights and brakes in such condition, says that all witnesses are agreed that the work of mechanics has a direct and intimate relation to safety of operation, and it finds that mechanics devote a large portion of their time to such work. As to loaders, the Commission says that the large carriers,[5] particularly those having important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, whose sole duties are to load and unload freight and transfer it either from one vehicle to another, or between the vehicles and warehouse; that the evidence makes entirely clear that, in order that a motor vehicle may be safely operated, it must be properly loaded (here the Commission sets forth the reasons why this is so); that the great

[4] The Commission states (132) that most motor carriers operate less than ten vehicles; that it is shown that such carriers do not employ mechanics for repair work but have the work done in commercial garages; and that it, of course, has no jurisdiction over employees working in such garages.

[5] In the case of small carriers, the Commission mentions that it is the practice to have the drivers load and unload freight and that this presents no problem because the drivers are, in any case, subject to its jurisdiction.

majority of such large carriers [6] handle freight of such size and weight that proper loading is an essential to safety of operation; and that it concludes that "loaders" devote a large part of their time to activities which directly affect such safety.

Thereafter, the Commission discusses in the same manner the class of employees within the category of drivers' helpers, including conductorettes employed by certain bus operators, whose primary duties are to see to the comfort of passengers but who, nevertheless, when accidents occur, help the driver in obtaining aid and protect the vehicle from oncoming traffic.

Near the end of the report (138–139), the Commission sets out its ultimate findings of fact. Generally described, it finds separately as to each of the classes of employees, above referred to, that they (the said mechanics, loaders and drivers' helpers) devote a large part of their time (a substantial part [7] in the case of drivers' helpers) to

[6] In this connection the Commission says in effect that, while it is true that certain carriers, particularly certain private carriers, transport only freight of such light weight that its manner of loading would not adversely affect safety, nevertheless, its study indicates that such carriers do not generally employ loaders but on the contrary the drivers (in any event subject to its jurisdiction) load and unload the vehicles.

[7] This finding in the case of drivers' helpers is shown particularly to reflect at best only a rough average. The drivers' helpers referred to do no driving, but the usual said helpers assist in the loading and unloading. Furthermore, at rail-

activities which directly affect the safety of operation. Thereafter, under the heading "conclusions of law," the Commission first defines the term "safety of operation"; its other conclusions are:

> 2. That our jurisdiction to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.
>
> 3. That we have power, under section 204 (a) of said Part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, and

---

road crossings they dismount and flag the driver and they act in similar capacity at busy highway crossings and when the truck is being turned around on the highway or is emerging from a driveway. Also they assist in the changing of tires when necessary and in cases of accidents aid in obtaining help. In addition to these helpers, the Commission refers to armed guards on armored trucks and conductorettes on bus lines, whose primary duties are, in the one case, to protect the valuables and, in the other, to see to the comfort of passengers, but who also in instances of accidents aid in the obtaining of help and in other respects. In including these latter in its findings (136), the Commission says substantially that it is neither necessary nor practicable to draw fine distinctions between the employees who ride on the vehicles; for they all "to some extent at least" engage in activities which directly affect safety of operation.

that we have no such power over any other classes of employees, except drivers.

Referring to the Commission's conclusion 2, that its jurisdiction to prescribe qualifications and hours of service is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation, it is evident from its intermediate discussion and findings that the Commission is speaking, not of individual employees, but of classes of motor carrier employees, certain of which it thereupon, in its conclusion 3, holds are subject to its authority and others of which it holds are outside its authority. That is to say, the Commission is not, by its conclusion 2, fixing a rule that each individual employee, in order to be subject to its power to prescribe qualifications and maximum hours, must be shown to have spent a substantial part of his time in safety work, but is referring to employees as a whole within the classes referred to in its report. With respect to the classes designated as "mechanics," "loaders," and "drivers' helpers," it holds (conclusion 3), that it has power to establish qualifications and maximum hours "for the classes of employees covered by" its findings 1, 2, and 3 above, and, continuing, it holds that it has "no such power over any other classes of employees, except drivers," as for example, "clerical employees" (130) and "dispatchers" (134–135), the activities of each of which it had theretofore considered generally and as a class

and had found that their work only indirectly affected safety of operation and, in the case of clerical employees, that many of them spent only an average of a few minutes a day on such work indirectly affecting safety.

As above shown, in its conclusion 2, the Commission concludes that its jurisdiction to regulate qualifications and hours of service is limited to those employees who devote a substantial part of their time to activities which directly affect safety of operation. To readily grasp the import of this, all that is necessary is to consider the conclusion from the standpoint of just what is its function in the report. Obviously its function in the report is not to serve as a guide as to whether each individual employee is or is not within the Commission's jurisdiction, but is as a conclusion leading up to and supporting the report's further conclusion 3, that the Commission has jurisdiction, or power, to establish qualifications and hours of service "for the classes of employees" specified and "has no such power over any other classes."

This showing in the report's ultimate conclusions themselves, that the Commission is speaking, not of individual employees, but of classes, is also confirmed by the reports earlier underlying discussion and findings. The Commission's earlier discussion of "mechanics and other garage workers" is illustrative of this. There (133), after referring to the fact that some carriers employ

garage workers other than mechanics, such as carpenters, tarpaulin tailors and men *who do nothing* but paint the vehicles, the Commission finds "that the work done by none of these employees affects safety of operation." [Italics supplied.] Continuing, the Commission further says:

> It is possible * * * that some of the larger carriers employ men whose *sole* duty is to see that the motor vehicles are properly supplied with oil, gas, and grease, or to wash the vehicles. In the majority of cases, *undoubtedly*, the mechanics perform this work. However, if there be employees who *do nothing* but oil, gas, grease, or wash the motor vehicles, we find that they do not perform duties which directly affect the safety of operation. To make our finding entirely clear, it is that mechanics are the only garage workers we find subject to our jurisdiction. [Italics supplied.]

By this latter statement, it is apparent that the Commission means that mechanics are the only class of garage workers over which it has jurisdiction. It had just given consideration to carpenters, painters and men who do nothing but wash, oil or grease the vehicles and had found that the work of none of these garage workers directly affect safety of operation. However, it emphasizes that, in order to be outside its jurisdiction, they must do nothing else, that is, no repair or other work of a mechanic at all. And it seems evident from this that, if even a small or

unsubstantial part of their time were devoted to repair or other work of a mechanic on the vehicles or their parts, it would regard them as included in the class designated as "mechanics" and subject to its power to regulate qualifications and hours of service. It had previously said, when discussing mechanics directly (132), that all witnesses were agreed that the work of mechanics has "a direct and intimate relation to safety of operation, and no conflicting evidence was submitted."

Furthermore, in its discussion of the class of employees called drivers' helpers (136), the Commission expressly says "that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver." Here the Commission is referring particularly to two kinds of drivers' helpers, (1) the armed guards who ride with the drivers on armored trucks and who, while primarily employed to protect the valuables transported, nevertheless, in case of accident or other emergency aid the driver in obtaining help and in other respects, and (2) conductorettes employed by certain bus lines whose duties, while primarily to see to the comfort of passengers, also include the duty, in instances where accidents occur, of assisting the driver in obtaining aid and in the protecting of the vehicle from oncoming traffic. It will be seen, particularly in the case of conductorettes, that their duties, insofar as affecting safety of

operation, are not only limited but attach only "in instances where accidents occur." While such accidents may at times occur frequently, they could not, it would seem, be always expected to be a matter of daily or even weekly occurrence. Following its statement, above quoted, that it is neither necessary nor practicable to draw fine distinctions between the various employees other than drivers who ride on the vehicles, the Commission says that—

> To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continued controversy. They will be included in the category of helpers.

The Commission, in all that it says above and particularly its statements to the effect that, since all the employees referred to engage *to some extent at least* in activities directly affecting safety of operation, it should not attempt to limit its jurisdiction over them in accordance with the degree in which they do so, disputes practically in express language that, by its conclusion (2) at the end of the report, it is setting up a rule that, in order that individual employees fall within its jurisdiction over qualifications and hours of service, it must in every case be shown that they devote a substantial part of their time to work

directly affecting safety of operation. The language "to some extent at least" engaged "in activities which directly affect safety of operation" obviously is not used to mean engaged *to a substantial extent* in such activities; and it, in fact, reminds of the holding of the Appellate Court of Illinois (see p. 5, *supra*) to the effect that it is enough, in order to bring an employee within the Commission's authority over qualifications and hours of service, that he perform *some* work substantially affecting safety of operation.

It has been above pointed out (p. 14, *supra*) that, if the Commission's conclusions 2 and 3 at the end of its report are read together, as they must be, it clearly appears that its statement in the former, that its jurisdiction is limited to those employees who devote a substantial part of their time to safety work, refers, not to individual employees, but to employees as a whole within the classes named and discussed in the report. And this normal reading of the conclusions is, it seems evident, borne out and confirmed by the Commission's underlying discussion and findings on which the conclusions are predicated and based.

Reverting to the decisions of the Appellate and Supreme Courts of Illinois in the present case: Although those courts differed on the question of whether the quantity of (or time spent in) work affecting safety of operation was the true determinant of whether Levinson came within the Commission's authority over qualifications

and hours of service, both courts, in holding that he did, relied on the showing that he was in the same position as the loaders in his gang. As above shown, the Commission, in *Ex Parte No. MC–2, supra,* while pointing to the fact (134) that loaders are, when distributing freight properly in the vehicles, engaged in important safety work, also recognized that they did much other work, such as unloading and transferring the freight between vehicles or between vehicles and warehouses, which latter work, it is clear, the Commission did not regard as directly affecting safety of operation. In the present case, it appears (Petition for Writ, 22) that Levinson testified "that not much loading was done during his hours"; that "most of the outbound freight was done at night, while he worked mostly days"; but that, however, "whatever took place was under his direct charge." On the other hand, the defense testimony was "that inbound and outbound freight was equally divided during the day—inbound usually during the night and out-bound between 8 A. M. and midnight."

The Appellate Court states that thus there was a dispute in the testimony, and it does not appear that it attempted to resolve the dispute, but that, instead, it relied upon its ruling that, if some, or any, part of an employee's time is devoted to work which substantially affects safety of operation, that is enough to bring him within the Com-

mission's authority over qualifications and hours of service and thus except him from the overtime pay provisions of the Labor Standards Act. Relying in part, apparently, on Levinson's testimony that, while not much loading was done during his hours, whatever took place was under his direct charge, the Appellate Court says that there is no question that some part of Levinson's work week was devoted to the direction and supervision of the loading; that there is no question either that the loaders in his gang were exempted from Section 7 of the Labor Act; and that, therefore, it thinks that, with greater force, Levinson, who planned and directed the loading was exempt.

Levinson, in his petition for writ of certiorari, does not question that some part of his time was devoted to the direction and supervision of the loading but he excepts (p. 6) to the court's holding that the loaders in his gang "were exempt from Section 7 and that, therefore, with greater force he came within the exemption, because there was no issue, evidence, stipulation or finding in the record that the loaders were exempt." However, it appears that, under Illinois law, the Appellate Court may make findings independent of the trial court and, as shown in the Appellate Court's opinion, there was convincing evidence that the manner in which loading is done substantially affects safety of operation. Accordingly, assuming the correctness of the court's view that

the exemption applies if some part of an employee's time is devoted to work which substantially affects such safety, it is apparent that the court was within its authority in finding that the loaders in Levinson's gang were exempt. If Levinson devoted some of his time to such work it would seem to follow that the men in his gang did also. Moreover, it appears from Levinson's petition (p. 12) that the trial court found that the *major* portion of his work did not affect safety of operation and also (p. 13) that Levinson, in contesting respondents' appeal to the Appellate Court, contended, among other things, that the *major* part of his duties did not affect such safety. Both the said finding of the trial court and Levinson's contention before the Appellate Court may be said to have at least carried the import that some part of Levinson's duties did affect safety of operation.

As already mentioned, the Supreme Court of Illinois, although holding (R. 62–64), contrary to the Appellate Court, that "the true determinant" was not whether an employee performs some, or any, duties which substantially affect the safety of operation but was whether a substantial part of his duties affect such safety, nevertheless, affirmed the judgment of the Appellate Court on the ground that the latter had found that Levinson was in the same position as the loaders in his gang. As to this the Court said (R. 64):

> The Appellate Court found that the loaders in appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading effecting the safety of operation.
>
> The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.
>
> The Appellate Court may be in error in the reason given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

From the above it is evident that the higher court considered that, despite the view of the Appellate Court that the quantity of Levinson's activity was not the true test of exemption, nevertheless its findings did in fact embrace what it (the reviewing court) regarded as necessary. It had said (R. 63) that, under the State law, the Appellate Court might make findings of fact different from those of the trial court which must be accepted so long as they "sufficiently appear in the opinion or in the final judgment, or from an examination of the two" together. The Appellate Court had the record before it and, as stated by the higher court, it did find that the loaders in

Levinson's gang were exempted from section 7 of the Labor Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation. But, having the Appellate Court's other findings in mind, it is not clear that its findings, or conclusions, to which the higher court points, did in fact embrace findings that, either the work of Levinson, or that of the loaders in his gang, was, in substantial part (R. 64), work affecting the safety of operation.

However, this may be, it is believed that the Appellate Court's view as to the true test of exemption from the Labor Act, applied as it is to an individual employee, is correct; that that court's opinion is in this respect in substantial accord with the Commission's report in *Ex Parte No. MC--2, Supra,* and that its decision is in other respects entirely sound.

The Appellate Court's holding that, where an employee performs work which substantially affects safety of operation, he is, regardless of its quantity, subject to the Commission's authority over employee qualifications and hours of service, is entirely sound and correct

In addition to the fact that it is considered that the view of the Appellate Court as to the true test of exemption from the Labor Act is in substantial accord with the Commission's report in *Ex Parte No. MC-2, supra,* it is believed that consideration of the statutes and of this Court's de-

cisions shows that that view, rather than the view of the Supreme Court of Illinois, is correct and in accord with the purposes of Congress.

However, before discussing these considerations, it is desired to emphasize that the Commission does not agree with the allegations in the petition (pp. 8, 11) to the effect that questions of what employees are subject to its authority under section 204 (a) of the Motor Carrier Act are questions committed to it for determinations of administrative finality or that they are in fact committed to it at all, except in the sense that, as and when they arise in performing its duties, it may *incidentally* determine them. Cf. *Tex. & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 272. For one thing, there are two administrative bodies here involved, and it will be realized that the Wage-Hour Administrator, in performing his duties under the Labor Act, meets with, and must also *incidentally* determine the identical questions. Although it is true that final determination in any case that certain employees are, or are not, subject to the Commission's authority under the said section of the Motor Carrier Act is determinative of whether or not they are exempt from section 7 of the Labor Act (*Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49), nevertheless, neither the Commission's incidental (i. e., quasi-judicial) determination of their status under the Motor Carrier Act, nor that of the Wage-Hour Administra-

tor, is in any sense final except as sustained by the courts.

As above mentioned, while this Court, in the *American Trucking Association* case, *supra,* said that the interpretation and meaning which the Commission and the Wage and Hour Division of the Department of Labor had placed on section 204 (a) of the Motor Carrier Act (referred to in the exemption provision, sec. 13 (b) (1) of the Labor Act) were entitled to great weight (549), it also made plain (544) that, except for the rule according weight to the views of administrative bodies, such "interpretation of the meaning of statutes, as applied to judicial controversies, is exclusively a judicial function." Although, in certain court cases brought, as is the present one, under section 16 (b) of the Labor Act, it has been urged [8] that the particular question (involved in the general question of jurisdiction) of what kinds of work affect safety of operation is committed by Congress to the Commission, the statutes involved in no way indicate that that is the case (Cf. *Shields* v. *Utah-Idaho R. R.,* 305 U. S. 177, 181–182; *Gray* v. *Powell,* 314 U. S. 402), but, on the contrary, the Labor Act, by the very fact that it authorizes actions, wherein determinations of the question are necessary, to be brought directly in court, shows plainly that such determinations are placed with the courts and withheld from the ad-

[8] It was so held in *Ispass* v. *Pyramid Motor Corp.,* 59 Fed. Supp. 341.

ministrative bodies, that is, as determinations of administrative kind and finality.[9] *Shields* case, *supra*, p. 185; *Powell* v. *United States*, 300 U. S. 276, 287–288; *United States* v. *Idaho*, 298 U. S. 105. Moreover, the question of what kinds of work affect safety of operation is here a part of the function of interpreting the meaning of the statutory provisions involved and, although in the case of rate tariffs there is, as asserted in the cases mentioned, an exception to the rule that the function of interpreting written instruments is for the courts, such exception applies only to tariff questions which are particularly intricate and involve words of peculiar and unusual meaning. *Standard Oil Co.* v. *United States*, 283 U. S. 235. And further, the exception in the case of the carriers' tariffs is practically compelled by the rate uniformity rule, that is, the Interstate Commerce Act's fundamental purpose to stop all rate dis-

[9] True there are court cases, where the courts, finding that *in fact* administrative questions are involved, refer the same to the Commission or other administrative body (*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422), but here, in the very statute containing the exemption provision Congress has authorized the court actions in which the questions arise and thus plainly has left the questions as mixed questions of law and fact for the courts and has not made of them questions requiring prior administrative determination. As further indicative of its purpose in this respect, it is perhaps also significant that Congress, in authorizing the court actions, appears to have had in mind convenient forums for the parties, in that it provided that they might be brought in any court of competent jurisdiction.

criminations and to require equality of rates in all cases.

However, while, as regards the jurisdictional questions here involved, neither the Commission's rulings nor those of the Wage-Hour Administrator, are administratively final on the courts, the views of the Commission, as shown in its report, that the work of that class of motor carrier employees designated as "loaders" directly affects the safety of operation of the carriers' vehicles on the highways appears hardly open to question, and, accepting as established that such work does in fact directly affect such safety, it seems clear that, regardless of the amount of time devoted to the work by an individual loader (or loader foreman), he is expected to be fitted, and in fit condition, to perform it when the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service.

It is realized that it might be urged, or argued, that, if, in the case of particular employees of a class performing work which directly affects safety of operation, it is true that the Commission's authority attaches regardless of the amount of time devoted thereto, then this would be equally true of the class itself, that is, that the Commission's authority would attach even though the time spent in such work by the employees of the class as a whole was unsubstantial. But it will be seen that a real distinction exists. The Com-

mission, in *Ex Parte No. MC-2* was not considering the status of particular employees but was determining, with respect to the several classes of employees of motor carriers, other than drivers, whether its authority to establish regulations of *general application* attached and applied. In determining this question, the Commission considered that, where it was shown that employees of a class as a whole spent only an unsubstantial part of their time in work affecting safety of operation, it was not expected to assert, as to such class, the authority given it to regulate qualifications and hours of service. But, while that view appears sound in the case of employees of a class as a whole, it in no way follows that, in order that a particular employee (of a class clearly subject thereto) be within the Commission's said authority to establish regulations of *general application*, he must individually be shown to devote a substantial part of his time to work which directly affects such safety. It must be considered that Congress, in clothing the Commission with authority of such kind, intended that it should be applied in a way that would give to it a practicable "working" in effectuating its remedial purpose of promoting safety on the highways, and that it did not, as in effect said by the Commission (136), intend that fine distinctions be drawn between the various employees within a class where all are "to some extent at least"

engaged "in activities which directly affect safety of operation."

Furthermore, it should be kept in mind that, so far as the text of section 204 (a) of the Motor Carrier Act is concerned, the authority given the Commission applies to the employees of common and contract motor carriers[10] without any limitation or qualification whatever. Although, having in mind the purpose of the statutory provision to promote safety of operation, it is plain that it has no application with respect to clerical or other classes of employees whose work, if affecting such safety at all, only remotely or indirectly does so, nevertheless, where the classes under consideration consist of employees such as drivers, drivers' helpers, loaders, and mechanics, whose work obviously has direct relation to such safety and who plainly, as employees of a class, as a whole spend either a large, or a very considerable part of their time in such work, then and in such case, it would seem that the sweep of the language of section 204 (a)—the fact that literally it applies to all of the carriers' employees—considered together

[10] This is not true of private carriers, for, as to them, section 204 (a) (3) expressly provides that the authority given the Commission to prescribe qualifications and hours of service of employees is to the end of promoting safety of operation. But the significance of this, if any at all, would be that it serves to emphasize rather than otherwise that no limitation as to purpose is in terms imposed on the like authority given the Commission in respect of the employees of common and contract carriers.

with the fact that the authority conferred on the Commission is authority to establish regulations of general application,[11] affords strong reason for a construction thereof which would not "draw fine distinctions between the (quantity) of the work done by the various employees" within a class, but would enable its practicable application and the effective carrying out of the statute's purpose.

As above said, it is evident that, where the work of an employee does directly affect safety of operation, he is, regardless of the amount of time devoted thereto, expected by the statute to be fitted, and in fit condition, to perform it whenever the occasion arises and therefore intended to be subject to the Commission's authority over qualifications and hours of service. As illustrative of this, the Commission's report in *Ex Parte No. MC–2, supra,* in discussing the evidence as to mechanics (132), refers to the importance of their duties in checking, and adjusting if necessary, the brakes and headlights of motor vehicles. Even assuming that, in instances of particular employees, such duties occupied only a few minutes daily of their time, still, if because of excessive hours they are

[11] Cf. *Assigned Car Cases*, 274 U. S. 564, 583. While the Court's holding in this case as to the Commission's broad authority in establishing rules or regulations of general application relates to the formulating of the rules rather than to the interpretation of the provision conferring the authority, still the basis for such authority is, similarly as the reason here, to enable a practicable and effective application and use of the authority conferred.

overfatigued when called upon to examine, or adjust, brakes or headlights, it is evident that the work might be carelessly, or inattentively, done.[12] And further in this connection, and in connection with the rule that remedial statutes are to be liberally, and not narrowly, read, it is certainly the fact that there could be few remedial purposes, in the interest of the general public, more compelling than Congress' purpose here of promoting safety on the highways.

This brief, in its discussion so far of the case before the Court, has been particularly directed to the decisions of the Appellate and Supreme Courts of Illinois, the former of which it is believed and submitted is in all respects sound. However, since the petitioner, Levinson, is seeking to have the appellate courts reversed and the trial court sustained, and the Commission is not in accord with his contentions, it seems necessary to refer briefly to the particular respects in which it is believed that the trial court was in error.

Speaking of the trial court's decision and Levinson's contentions, the opinion of the Appellate Court says (petition, p. 21) that the latter relies

[12] In the *American Trucking Association Case*, *supra*, this Court, in holding that the Commission's authority under section 204 (a) was limited to those employees whose work affected safety of operation, referred to no further limitation, conditioning the Commission's authority over an employee on the amount of time he devoted to work affecting such safety.

mainly upon *Anuchick, et al.* v. *Trans-American Freight Lines,* 6 Labor Cases (U. S. Dist. Ct., E. D. of So. Michigan) No. 61,245, and that—

> * * * In the *Anuchick case,* the court found that certain employees devoted a *substantial part* of their time to work not directly affecting safety of operation and, on the theory that it was bound by the Department of Labor's interpretation of the term "substantial" in Bulletin No. 9, gave judgment for the employees. The interpretation in Bulletin No. 9 then prevailing was that "substantial" meant in excess of 20% of duties not connected with *loading and unloading.* Bulletin No. 9, as revised to October 1943, modifies the earlier interpretation to mean "the *greater part* of his time during any work week on non-exempt activities." We assume the court in the *Anuchick case* would have accepted this later interpretation had it then been effective and unless the employees there spent the *greater part* of their time on duties not directly affecting safety, would have held against them. These various interpretations suggest the difficulty of finding the proper rule here. The trial court apparently applied the later interpretation of the Department of Labor.

As indicated by the above, the judgment of the trial court in the present case does not directly show whether or not, in reaching its decision, it applied the interpretation of the Department of

Labor, or whether, if doing so, it considered that it was bound by the interpretation. But, however this may be, it clearly appears that the trial court, in holding that Levinson was not excepted from the overtime pay provisions of the Labor Act, based such holding on its finding that the greater, or major, portion of his work did not affect safety of operation. It would therefore seem that the criterion followed by the court was one predicated upon a balancing of the amounts of safety and non-safety work done by an employee, and which assumed that, where that portion of his work not affecting safety of operation was the greater in amount, he was not subject to the Commission's authority over qualifications and hours of service under the Motor Carrier Act and consequently exempt from the overtime provisions of the Labor Act, but was covered by the latter.

But the exemption clause of the Labor Act (sec. 13 (b). (1)) does not provide for a balancing or measuring of the safety and non-safety work performed by an employee in order to determine whether he is subject to the one Act or to the other. On the contrary, it provides that the overtime provisions of the Labor Act "shall not apply with respect to any employee with respect to whom the Commission has power (under the Motor Carrier Act) to establish qualifications and maximum hours of service." And it thus leaves the question of exemption from the Labor

Act to be determined solely by whether the employee is subject to the Commission's said authority under the Motor Carrier Act. As said by this Court in *Southland Co.* v. *Bayley*,[13] 319 U. S. 44, 47 (a case instituted by drivers in the employ of a private carrier):

> * * * Section 13 (b) (1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission "has power to" prescribe maximum hours of service. Section 204 (a) (3) certainly gives "power to the Commission to establish maximum hours for the employees here involved."

And, in this connection the following statement of the Court on the succeeding page is pertinent, to wit:

> * * * By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Car-

[13] In this case (involving an action for overtime pay brought by employees of a private carrier), it was contended that, since the Commission had not as yet found that there was need to establish qualifications and hours of service (a finding specified in section 204 (a) (3)), it did not have the "power" to establish them in a sense having the effect of exempting employees from section 7 of the Labor Act. The Court, however, based on the reasons given in its opinions, held that, while the "power" referred to in sec. 13 (b) could not be exercised until the finding was made, it had nevertheless been in existence since the enactment of the Motor Carrier Act in 1935.

rier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime.

Not only does the language of section 13 (b) (1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers. * * *

While the above speaks only of drivers and refers to the fluctuating hours of such class of employees, nevertheless, it appears to be based principally on the language of the exemption clause in section 13 (b) (1) and, therefore, presumably applies to "any employee with respect to whom the Commission has power to establish qualifications and maximum hours of service." As stated by the Court, section 204 (a) (3) certainly gives such power to the Commission over drivers, and it is believed that the Commission clearly also has such power over "loaders" and the other classes of employees specified in its report in *Ex Parte No. MC–2, supra.*

As above pointed out, section 204 (a) of the Motor Carrier Act implements its purpose to promote safety on the highways by the authority conferred on the Commission to regulate employee qualifications and hours of service. Accordingly,

it is apparent that, where the work of an employee directly affects safety of operation, he is, regardless of the amount of time devoted to such work, expected by the statute to be both qualified and in fit condition to perform it whenever the occasion arises. The intention that he be qualified plainly applies in all cases where the work of an employee directly affects such safety, and it is evident, of course, that overfatigue from excessive hours may result, not only from that part of such employee's work affecting safety of operation, but also from that part not affecting such safety.

Respectfully submitted.

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